No. 11,630

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

B. SAMUELS,

Appellant,

vs.

UNITED SEAMEN'S SERVICE, INC., a non-profit organization,

Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF FACTS.

Appellee believes that an amplification of appellant's Statement of Facts may be of some assistance to this Honorable Court:

As soon as initial, local, pre and organizational multitudinous details permitted, Mr. Fallon, first Port Executive, was the individual originally thrown in contact with Mr. Meyer (appellant's agent) about the premises now involved.

Tr. p. 51.

Mr. Meyer subsequently forwarded a lease.

Tr. p. 51.

Mr. Fallon, pursuant to interoffice routine that existed at that time, this being a legal matter (the lease), referred the matter to the national office of appellee at New York City.

Tr. p. 51.

Appellant's agent (presumably) or attorney (no evidence or stipulation as to the latter),

Tr. pp. 37, 41, 43.

prepared and submitted lease in question; same forwarded to national office, executed, returned, and delivered to Mr. Meyer.

Tr. p. 52.

Appellant (not appellee) chose and used the words, "cessation of hostilities in the present war with Japan."

Tr. p. 53.

Appellant prior to, at the time of execution of the lease, nor until March of 1946, neither directly or indirectly, either orally or in writing, by inference or specification, added to or changed, defined or elaborated what appellant meant or what acts measured the words, "cessation of hostilities in the present war with Japan" or the national, international or legal aspect or effect which is so clearly and definitely shown by,

> "Q. Did Mr. Meyer ever discuss with you the use of the words 'cessation of hostilities in the present war with Japan?' Did he differentiate between an armistice or a peace treaty and the end of the shooting war?
>
> A. No, there was no differentiation made."
>
> Tr. p. 53.

Further that,

"Q. There was no actual discussion between you and Mr. Meyer about when the lease would end?

A. No."

Tr. p. 53.

That Fallon's duties consisted of "overall administration of welfare and social service programs for merchant seamen."

Tr. p. 57.

That Mr. Philbrick interviewed Mr. Meyer in February or March of 1946, who advised, and suddenly, and for the first time, "Your lease has expired * * * our owner has been offered * * * $1,000.00 a month."

Tr. pp. 61-62.

Appellee never received oral or written notice of termination.

Tr. p. 63.

That thereafter Mr. Meyer prepared a supplemental statement which was, as in the first instance, duly forwarded by Mr. Philbrick to the national office; whereupon Mr. Philbrick was advised by the national office, "You already have a lease. You don't have to do anything."

Tr. p. 64.

QUESTIONS PRESENTED.

The sole question presented is whether the (lessor's) language (chosen and used by appellant and not the subject of argument, definition, discussion, elaboration, meaning of "cessation of hostilities", negotiation or speculation) used in said lease is (not so much) susceptible of the construction (now) contended for by appellant (but whether the lessor having created by her own language an ambiguity, that said ambiguity should be construed and resolved against the party responsible therefor), or to express it specifically, whether a lease terminating upon a period after the cessation of hostilities (where the lessor has had the means and right to define and specify by whom, what, when, where and how the contingency to be effective and resolved) in a particular war, without further provision demands a formal, political, governmental or legal determination or declaration of such cessation as against the actual suspension of warfare itself.

Appellee's paraphrasing of appellant's question within parenthesis.

The additional questions are:

Any ambiguity in the language or phrase "cessation of hostilities" should be construed against the user, the lessor (the appellant), and not against the acceptor, the lessee (the appellee).

May an appellant, who being required not only to plead but to prove the allegations of her complaint, complain in the event of an adverse judgment where the evidence and transcript discloses her failure to conform to such rule?

If "cessation of hostilities" ended per appellant's contention, the lease provided for its termination by either act of the parties or by operation of law, and neither contingency having occurred, appellant and/or the Court may not substitute judicial processes.

Is not the question of war and peace, and necessarily "cessation of hostilities", political and not judicial?

Did the President's Proclamation of the 12th day of December, 1946 specifically declare "cessation of hostilities?" Did said Proclamation definitely establish the event, period or time from which the term of six (6) months (which is involved in this litigation) commences to run?

SUMMARY OF ARGUMENTS.

1. Appellant, through her representatives, having drawn and submitted to appellee a written lease which was then executed, may not now attempt to construe any alleged ambiguity of her own language to accomplish her own desired present purpose—to so permit, appellant would accomplish same, by her self-serving declarations and interpretations.

2. That appellant has failed to prove the allegations of her complaint.

3. That appellant neither pleaded nor attempted to prove the termination of her lease.

4. That "cessation of hostilities" is a political and not a judicial question.

5. That "cessation of hostilities" clearly, explicitly and specifically declared as of Noon, the 12th day of December, 1946, which document contains the event which commences and marks the beginning of the running of the "six (6) months from and after the cessation of hostilities in the present war with Japan."

ARGUMENT.

1. Mr. Meyer, appellant's agent, is an astute, prudent, successful and well educated business man, specializing in properties and their leasing and representing valued clients and interests in this area.

By the very nature of his occupation and even in spite of himself, that proverb,

"Make every bargain clear and plain
That none may afterwards complain."

necessarily, instinctively and deeply engrained, irrespective of any knowledge of law; the rules of construction, interpretation and the use of words and by whom.

In addition to the foregoing preliminary statement, the importance, ramifications and terribleness of World War II were intensely followed by all interested in their country's and/or personal survivorship.

The government of the United States of America as of the declaration of war with Japan on or about the 9th day of December, 1941, announced to the world, and repeatedly committed itself thereafter to

the complete defeat of Japan and the elimination of any and all hostile elements therein or any hostilities connected therewith, and appellee is unable to appreciate that as of the 15th day of September, 1943 (the date of the lease) that Mr. Meyer was unaware of such a completely definite course of action.

Mr. Meyer solely prepared the lease in question (not appellee) and the words, "cessation of hostilities in the present war with Japan," therefore, chosen and used by appellant and they were not the subject of argument, definition, discussion, elaboration, negotiation or specification, and in the absence thereof it therefore must necessarily follow:

AS TO THE LANGUAGE.

That if appellant in using words of disputed phrase, intended the now contended construction of, "cessation of open and hostile warfare," (quoted words taken from appellant's complaint, Paragraph IV) that appellant's failure raises the question that by reason of appellant's own act, who should suffer:

THE USER OR LESSOR, THE ACCEPTOR OR LESSEE.

In the absence of such clarification and failure, recourse must necessarily be to the only source provided—the Courts; or in other words, appellant had the power and right to decide the phrasing—failed to do so—forfeited the right and in so doing accepted the alternative—the common and universally recognized authority—the Courts.

"The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

1644 C. C.;

6 Cal. Juris. 284.

"In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party."

1654 C. C.;

6 Cal. Juris. 307.

"When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made."

1864 C. C. P.;

6 Cal. Juris. 307-309.

In support of cited and quoted basic code sections, appellee relies upon the leading case in the State of California (on a lease) in which the entire matter

and the law were thoroughly covered and reviewed and which has never been modified or reversed.

"Furthermore, if there be any doubt about the meaning of the two clauses in the instant case—if there be any ambiguity or uncertainty—that ambiguity or uncertainty must be resolved in favor of the lessee, the lessor being the scrivener. (Sec. 1654, Civ. Code.) This rule has long been enforced in grants and leases. One of the earliest pronouncements is contained in *Dann v. Spurrier,* 3 Bos. & P. 403 (127 Eng. Rep. 220): 'Much is to be found in the books relative to the construction of deeds which contain covenants in the alternative; from all of which the rule appears to be perfectly clear, that if a doubt arise as to the construction of a lease between lessor and lessee, the lease must be construed most beneficially for the latter.' This rule was followed by our appellate court, and concurred in by the supreme court, in *Butt v. Maier Etc. Brewery,* 6 Cal. App. 581 (92 Pac. 652). The court was there construing the following clause in a lease: 'At the expiration of this lease the said second party shall have the prior right to lease the same, said premises, for a further term of five years, for the rental sum of $3,000 for the full term, payable at the rate of $50.00 per month on the first of each and every month of said term. Provided, however, that if the said second party shall avail itself of that privilege, that then and in that event the said first party shall not be required to pay for any improvements at the end of said second term of five years, but that then, at the option of said first party, the said premises shall be surrendered to her with all improvements

thereon.' With reference thereto the court said: 'The word "prior", as used in Clause 2, does not qualify the right of renewal. The right given the lessee to lease for a further term of five years must necessarily be prior to the right of other parties to lease the property. As we construe the lease, it was optional with the lessee whether it made any improvements or erected any buildings upon the leased premises, or elected to renew the lease for a further term. If it erected buildings and the lessor exercises its option to demand the surrender of the leased property and offered to pay the value of such buildings, it was optional with the lessee to assent thereto, thus waiving its right to renewal, but there was no legal obligation so to do. Thus construed, there is no ambiguity in the provisions of the lease. If, however, *it be conceded that the lease is conflicting in its terms, or uncertain in meaning, then under the provisions of section 1654, Civil Code, it "should be interpreted most strongly against the party who caused the uncertainty to exist."* "The promisor is presumed to be such party." In this case, the lessor is the promisor. (Citing Cases.)'

Hence any 'conflicting terms' in the instant lease should be construed most strongly against Glenn, the appellant. As the supreme court of Pennsylvania has well said in Kaufmann v. Liggett, 209 Pa. 87 (103 Am. St. Rep. 988, 67 L.R.A. 353, 58 Atl. 129, 132): 'As a general rule, in construing provisions of a lease relating to renewals, where there is any uncertainty, the tenant is favored, and not the landlord, because the latter, having the power of stipulating in his own favor, has neglected to do so, and also upon the prin-

ciple that every man's grant is to be taken most strongly against himself.' To the same effect, see *Fergen v. Lyons,* 162 Wis. 131 (155 N.W. 935, 937); *Gates v. Hutchinson etc. Co.,* 88 Wash. 522 (153 Pac. 322, 324); *Burgener v. O'Holloran, supra.*"

(Italicized language italicized in the decision.)

Glenn v. Bacon, 86 Cal. App. 58-72(3), 260 Pac. 559.

AS TO THE COMPLAINT.

2. Paragraph IV, appellant's complaint, alleges:

"That by the words, 'cessation of hostilities in the present war with Japan'."

Tr. p. 3, Par. IV.

"Plaintiff * * * intended to refer to the cessation of open and hostile warfare."

Tr. p. 3, Par. IV.

"* * * *and defendant intended* to refer to the cessation of open and hostile warfare." (Italics appellee's.)

Tr. p. 3, Par. IV.

AS TO THE TRIAL.

APPELLANT'S EXPECTATION OF PROOF.

Appellant's attorney advised the trial Court in his opening statement:

"As part of our proof I would like to offer in evidence the original lease."

Tr. p. 27.

Same introduced and marked appellant's Exhibit I and a "Victory Proclamation" being introduced, marked appellant's Exhibit II.

APPELLANT'S ACTUAL PROOF.

Logically, legally and evidentially the only purpose of the lease and its introduction is to establish that it is the document containing the phraseology involved and necessarily the basis of this litigation.

The controversial words do not in any manner whatsoever support, much less prove, the allegations that, "plaintiff and defendant intended * * * cessation of open and hostile * * *."

A careful review and consideration of standard definitionists, Funk & Wagnall, Webster, and others, discloses a marked difference between meaning of actual phrases and contended intention and interpretation.

Enmity—hatred (hostile) may frequently and usually (under circumstances of armed occupation) is outwardly non-existent, yet actually not only a live and dangerous possibility, but a probability.

Appellant's Exhibit II bears the caption—Proclamation 2660 (Victory—Day of Prayer).

"Cessation of open and hostile warfare" language or verbiage does not necessarily or at all mean that as a matter of fact that cessation actually occurred; this Honorable Court is required to take judicial no-

tice of official pronouncements of our Government as to sporadic fighting in the Orient and South Pacific, but more important, of acts of various nature against the occupation forces in Japan culminating in the plot to assassinate General Douglas MacArthur (such acts in the world's history have produced a resumption of war and/or prolonged final settlement—the nature of appellee's best program and services depends upon such contingencies) and therefore, obvious that such enmity and hatred against our armed forces has not resulted in the "cessation of hostilities" until officially pronounced by due constitutional, governmental act.

Therefore, it is submitted that:

"Cessation of hostilities in the present war with Japan" and

"Cessation of open and hostile warfare."

does not constitute coincidental or synonymous language.

Therefore, appellant's Exhibit I merely proved a lease—nothing more. If quoted phrases identical or synonymous, there would be neither dispute nor law suit.

If it be conceded (which it is not) that "cessation of open and hostile warfare" and "unconditional surrender" are, and mean the same thing, there was nothing to prevent appellant from using, "cessation of open and hostile warfare" or "unconditional surrender" upon the drawing of said lease.

Appellee respectfully directs this Honorable Court to the fact that appellant produced not one witness,

nor any evidence or testimony in support of the allegations of the complaint that, "Plaintiff * * * intended to refer to the cessation of open and hostile warfare", nor any evidence or testimony in support of the allegations of the complaint that, "And defendant intended to refer to the cessation of open and hostile warfare."

POINTS AND AUTHORITIES.

"Proof is the effect of evidence, the establishment of a fact by evidence."

1824 *C. C. P.;*

10 *Cal. Juris.* 674.

"Evidence must correspond with the substance of the material allegations, and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness."

1868 *C. C. P.;*

10 *Cal. Juris.* 797.

"Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, nor even in such case when the allegation is a denial of the ex-

istence of a document, the custody of which belongs to the opposite party."

1869 *C. C. P.;*

10 *Cal. Juris.* 786.

"The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side."

1981 *C. C. P.*

Appellant's lease, while evidence, is no "evidence" in support of the allegations of appellant's complaint. The lease merely constitutes the document on which this controversy is involved and of itself only proves that there is a lease.

"There being no direct evidence introduced upon any issue the findings should be against the party who had the burden of proof."

1981 *C. C. P.;*

Dieterle v. Bekin, 143 Cal. 683 (77 Pac. 664);

Monterey v. Cushing, 83 Cal. 507 (23 Pac. 700);

Connolly v. Hingley, 82 Cal. 642 (23 Pac. 273);

Leviston v. Ryan, 75 Cal. 293 (17 Pac. 239);

Golson v. Dunlap, 73 Cal. 157 (14 Pac. 576);

Speegle v. Leese, 51 Cal. 415;

Roncelli v. Fugazi, 44 Cal. App. 240 (186 Pac. 373);

Gallick v. Bell, 41 Cal. App. 52 (181 Pac. 808);

Miller v. Donovan, 3 Cal. App. 325 (85 Pac. 159).

"In substance the trial court found and concluded that the plaintiffs and those legally charged with them sustaining the burden had not proved payment by a preponderance of evidence.

The officers or employees of the appellant corporation who might have made such payments did not testify (this was not a case involving an appeal or ruling on the preponderance of evidence but a total lack of proving any evidence) and their failure to testify in person or by deposition was not explained. From these facts the trial court was entitled to infer that the primary evidence, if produced, would have been adverse."

Roesch v. DeMota, 24 Cal. (2d) 563, 570, 571 (150 Pac. (2d) 422).

"We are thus confronted with the settled rule that when a party seeks relief, the burden is upon him to prove his case."

Cal. Employ. v. Malm, 59 Cal. App. (2d) 322, 323 (1), 138 Pac. (2d) 744.

"The burden of proof is upon the party presenting the affirmative of the issue. If there is no evidence upon an issue, the findings should be against the party who has the burden of proof."

Ellenberger v. City of Oakland, 59 Cal. App. (2d) 337, 339 (1), 139 Pac. (2d) 67.

It may not be overlooked that appellant first raised the issue herein, then filed her verified complaint; yet in support of the allegations thereof, in spite of the importance of the issue, Mr. Meyer, appellant's agent, could, should or would be the only individual who

could, should or would substantiate the allegation that, "Plaintiff and defendant intended to refer to the (cessation of open and hostile warfare)."

The failure to have the "benefit" of the presence and testimony of "the" witness in behalf of appellant can only mean one thing—that Mr. Meyer did not in fact, substance or words, negotiate a lease which appellant herself intended to refer to the "cessation of open and hostile warfare," as compared to the allegations that appellant and appellee both intended to refer to the cessation of open and hostile warfare.

> "All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions and may be controverted by other evidence. The following are of that kind:
>
> 6. That higher evidence would be adverse from inferior being produced."
>
> 1963 C.C.P. Sub. 6;
>
> 10 Cal. Juris. 761.

> "The failure of a party to call a witness may give rise to adverse presumptions."
>
> *Robinson v. Western States,* 184 Cal. 401 (194 Pac. 39);
>
> *Estate of Thomas,* 140 Cal. 397 (73 Pac. 1059).

AS TO POSSIBLE TERMINATION OF LEASE BY ACT OF THE PARTIES (LESSOR—EVICTION) OR OPERATION OF LAW.

3. The lease, appellant's Exhibit I,

> "* * * and will permit the lessor at any time after thirty (30) days to the expiration of this

lease to place upon said premises any usual or ordinary 'To Let' or 'To Lease' signs."

Eleventh paragraph.

No such signs requested to be placed nor actually put up.

"That in case suit shall be brought for an unlawful detainer of the said premises, for the recovery of any rent due under the provisions of this lease, or because of the breach of any other covenant therein contained, on the part of the lessee to be kept or performed, the lessee will pay to the lessor a reasonable attorney's fee which shall be fixed by the judge of the court as part of the costs of such suit. Upon the filing of any action for unlawful detainer the court in which said action is pending may appoint a receiver without notice to take possession of the said premises and collect any rent that may be or become due from any sub-tenant and to hold the same during the pendency of said action."

Thirteenth paragraph.

"All notices required by law, or by this lease, to be given to the lessee may be given personally or by depositing the same in the United States mail, postage prepaid, and addressed to the lessee, No. 39 Broadway, New York, N. Y."

Sixteenth paragraph.

Appellant neither gave nor served any notice of termination of lease.

Tr. pp. 63-71.

"Any holding over after the expiration of the said term, with the consent of the lessor, shall be

construed to be a tenancy from month to month, and shall otherwise be on the terms and conditions herein specified so far as applicable."

Twenty-first paragraph.

"Notwithstanding any other provisions hereof, lessee may at the time of cessation of hostilities in the present war with Japan, or any time thereafter, terminate this lease by mailing to lessor, in care of Milton Meyer & Co., No. 50 Sutter Street, San Francisco, California, or such other place as may be designated by the Lessor, a notice of such termination, specifying the date thereof, which notice shall be mailed at least thirty (30) days prior to the specified date of termination."

Twenty-third paragraph.

Appellant neither gave nor served any such notice.

"A lease may provide for the termination of a leasehold on notice."

15 Cal. Juris 776, paragraph 193;

Conner v. Jones, 28 Cal. 59.

"Any such notice is controlling and supersedes the necessity for the notices prescribed by statute, the two sorts of notices being quite distinct."

15 Cal. Juris 776, paragraph 193;

Watkins v. McCartney, 57 Cal. App. 643 (207 Pac. 909);

Burnham v. Nicholls, 1 Cal. App. 266.

"It is a general ruling that the receipt of rent accruing subsequent to an act or omission entitling a landlord to declare a forfeiture with

knowledge of the facts is a waiver of the forfeiture."

15 Cal. Juris. 787, paragraph 205;

German v. Golmer, 155 Cal. 683 (102 Pac. 932);

Jones v. Durrer, 96 Cal. 95 (30 Pac. 1027).

Admitted fact that appellee's monthly rental regularly forwarded to appellant by check each month, accepted and cashed.

"Notice to quit is legal method of terminating tenancy."

15 Cal. Juris 776, paragraph 193.

"Which notice is the initial step in the process of forfeiting the leasehold."

Downing v. Cutting, 183 Cal. 91 (190 Pac. 455).

Appellant neither gave nor served notice of eviction.

AS TO DETERMINATION OF WAR OR PEACE (CESSATION OF HOSTILITIES).

4. The question of war and peace, and necessarily of cessation of hostilities, has been repeatedly held to be political and not judicial.

"The Congress and The President are the constitutional judges of states of war and peace and their decisions should be abided in patience by people and courts."

U. S. v. Oglesby, 264 Fed. 691.

"War having been declared that condition must be recognized by the courts as in existence until the duly constituted national power of the country officially declares to the contrary even though actual warfare has long since ceased."

Perkins v. Rogers, 35 Ind. 124-167;

Kneeland v. Mich., 207 Mich. 546 (174 N.W. 605);

Palmer v. Pokorny, 217 Mich. 284-288, 186 N.W. 505.

In the case of *United States v. Anderson,* 9 Wall. 56, 69, 70, it was attempted to be maintained and argued that the Rebellion (Civil War) was in point of fact suppressed when the last Confederate General unconditionally surrendered to the national authority, and that the period of limitation began to run from that date. It is to be noted that the Supreme Court held such a contention incorrect.

In the case of *Stewart v. Kahn,* 110 Wall. 493-507. In the latter case the power is not limited to victories in the field and the dispersion of the insurgent forces, and carries with it inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress. In this case it was held that in the matter of debt, "the cessation of hostilities and the end of the war was dependent upon the Congress."

In *Hijo v. United States,* 194 U.S. 315-325, it was held that, "A state of war did not in law cease until the ratification in April, 1899 of the treaty of peace."

"A truce or suspension of arms," says Kent, "does not terminate the war, but it is one of the *'commercia belli'* which suspends its operations." It is thus established law from the Civil War and the Spanish American War, that cessation of hostilities depends upon Presidential or Congressional proclamation or enactment, that such in fact has actually come to pass.

It is interesting to note that such law was followed in the frequently cited case of *Hamilton v. Ky.,* 251 U.S. 146, as well as in *Kahn v. Anderson,* 255 U.S. 1-10, where it is held, "Even if I were to assume that the power were only co-extensive with a state of war, a state of war still existed to the treaty which terminates the war."

The *Hamilton* case involved a World War I question.

Said World War armistice was signed on November 11, 1918. The Prohibition Act was passed and approved November 21, 1918 and the question was raised directly as to whether or not cessation of hostilities or the period of the war had not in fact ceased as of some ten (10) days prior to its approval and enactment, and the *Hamilton* case specifically holds that, "The conclusion of the war clearly did not mean cessation of hostilities."

The very strong language contained in the decision in the *Hamilton* case does not stand alone, and appellee respectfully directs this Honorable Court's attention to another leading case, that is *Commercial Cable Co. v. Burleson,* 255 Fed. 99-104, where the

Court rejected the contention that certain wartime powers conferred on The President in the first World War had terminated with the armistice of November 11, 1918; also the *Commercial Cable Co. v. Burleson* case specifically states that there was no "cessation" in the sense in which that term is used.

In a comparatively recent case the following appears:

> "The Emergency Price Control Act was not ended by virtue of cessation of hostilities between the armies of the United States and the enemy countries in 1945.
>
> Syllabus 9,
>
> In absence of specific provisions to the contrary, 'period of war' extends to ratification of treaty of peace or the proclamation of peace.
>
> See Words and Phrases, Permanent Edition, for all of the definitions of 'period of war.'
>
> Syllabus 11,
>
> The cessation of hostilities between the United States and enemy countries did not end the war and a state of war still exists in absence of a formal treaty of peace.
>
> In the absence of specific provisions to the contrary the period of war extends to the ratification of the treaty of peace or the proclamation of peace. Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 165, 40 S. Ct. 106, 64 L. Ed. 194; Hijo v. United States, 194 U.S. 315, 323, 24 S. Ct. 727, 48 L. Ed. 994; The Protector, 12 Wall. 700, 702, 20 L. Ed. 463; United States v. Anderson, 9

Wall. 56, 70, 19 L. Ed. 615. In the Hamilton case the same argument was made as is now made here, that the end of state of war should be construed as the time when actual hostilities cease and when the actual war emergencies cease, by reason of our complete victory and the disarmament of the enemy, coupled with the demobilization of our army and the closing of war activities. In that case (251 U.S. 146, 40 S. Ct. 112), the court said:

' "Conclusion of the war" clearly did not mean cessation of hostilities.' To the same effect, Zimmerman v. Hicks, 2 Cir., 7 F. 2d 443, Ex Parte Sichofsky, D. C., 273 F. 694, Miller v. Camp, D. C., 280 F. 520. Under these authorities this court must reject the defendants' contention that a state of war no longer exists between the United States and the enemy countries and that, on the contrary, emergencies which gave rise to the enactment of the Emergency Price Control Act of 1942 as amended are still existent and the Price Control Act continues to be in full force and effect."

Bowles v. Soverinsky, 65 Fed. Supp. No. 11, pp. 808-813.

It is to be noted that this case again refers to the *Hamilton* case and was decided May 20, 1946 (the instant suit filed June 17, 1946) and has not since been modified nor reversed.

The clarity and continuity of the government with reference to cessation of hostilities is first disclosed when:

> "On September 2, 1945, the President of the United States, as part of his official proclamation said: 'As President of the United States, I proclaim Sunday, September 2, 1945, to be V-J Day —the day of formal surrender by Japan. It is not yet the day for the formal proclamation of the end of the war or of the cessation of hostilities'."
> Tr. p. 11.

This presidential proclamation (as to cessation of hostilities) again the matter of governmental concern when, and appellee quotes, "The Message from The President of the United States to The Congress of the United States, 79th Congress, First Session, House Document No. 282, United States Congressional Library, September 6, 1945" which message referred to the Committee of the Whole House on the State of the Union and ordered to be printed on page 9, in which it is stated:

> "The time has not yet arrived, however, for the proclamation of the 'cessation of hostilities' much less the termination of the war."

Underscoring of "not" is italicized in the message.

Very much in keeping with the two foregoing specific, executive, governmental action as to "cessation of hostilities," same received an exclusive enactment on the matter and appellee quotes at length The President's official proclamation.

"Cessation of Hostilities of World War II

By The President of the United States of America

A Proclamation

"With God's help this nation and our allies, through sacrifice and devotion, courage and perseverance, wrung final and unconditional surrender from our enemies. Thereafter, we, together with the other United Nations, set about building a world in which justice shall replace force. With spirit, through faith, with a determination that there shall be no more wars of aggression calculated to enslave the peoples of the world and destroy their civilization, and with the guidance of Almighty Providence great gains have been made in translating military victory into permanent peace. Although a state of war still exists, it is at this time possible to declare, and I find it to be in the public interest to declare, that hostilities have terminated.

Now, Therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the cessation of hostilities of World War II, effective twelve o'clock noon, December 31, 1946.

In Witness Whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this 31st day of December, in the year of our Lord nineteen hundred and forty-six, and of the Independence

of the United States of America the one hundred and seventy-first.

By the President: Harry Truman

James F. Byrnes
The Secretary of State."

Appellee submits that the prayer of appellant's complaint seeking a judgment of the trial court,

> "Specifically declaring that hostilities in the present war with Japan ceased on August 14, 1945, and that said lease by its terms ended and terminated on February 14, 1946."
>
> Tr. pp. 4-10.

is relief which the judicial branch of our government may interpret if a question has arisen relative to "cessation of hostilities" after, only, or in the event that the executive or legislative branches of our government have first proclaimed and/or enacted pursuant to the laws as embraced in the Constitution of the United States of America.

Further, that under the record and laws involved in this case, that the trial Court has not erred.

In closing appellee desires to comment on the two cases cited by appellant.

In *Nelson, Admr. v. Manning,* 53 Alabama 549 at 542 speaking of the "construction of the instruments" —a promissory note—the Court states,

> "If such a contract would be legal it must be expressed in clear and precise terms. It will not be derived from ambiguous, uncertain words or

words capable of clear or precise meaning in their usual signification * * *.

The intention of the parties is the thing to be ascertained in the construction of contracts, and in ascertaining it regard must be paid to the nature and character of the contract.

If its words are of doubtful meaning, they must be taken most strongly against the promisor.

Also, if it is susceptible of two constructions, that construction which will give it operation rather than that which will deprive it of all force must be adopted.

And if it is capable of two meanings, the one agreeable to and the other against law, the former must be followed."

And further, at page 552:

"It is in the making of peace by treaty between the belligerent powers which is the event—not the ratification of such treaty; but the declaration of peace—the cessation of hostilities, established and pronounced as a fact * * *."

It is further to be specifically noted that in said case, it is stated at page 552:

"On the 18th December, 1865 the President directed the Provisional Governor to surrender to the governor elect the office of governor, and his authority expired. On the 20th December, 1865 the surrender was made and from that day until it was superseded by the Reconstruction Laws, a government, the successor of the government ordained in 1819 prevailed in Alabama."

This situation is entirely different from the facts as to Japan and the United States. Neither The President nor The Congress has directed General MacArthur to surrender to anyone in Japan the authority or power of the United States; nor has General MacArthur individually attempted to assume such personal responsibility.

Nor has The President nor The Congress, nor General MacArthur, even as much as by implication, surrendered authority or power nor set any date for the expiration of any such authority or power.

In the *Nelson* case, as a matter of fact, by proclamation certain enactments and facts were set in motion and came to pass on the times set, which then permitted the marking of the period when the contingency occurred from which the time began to run.

This is not the situation in the instant litigation.

Appellant's next cited and relied upon case, as disclosed by her brief, is the *Kaiser* case.

Said decision discloses that:

> "The state legislature in making provision for carrying into effect the constitutional exemption referred to in 1929 enacted a law by which the words, 'in time of war' were given legislative interpretation. The following are recognized as wars within the intention and meaning of said section of the Constitution."
>
> Page 540 (3).
>
> "Where a constitutional provision may well have either of two meanings. If the legislature

has by statute adopted one, its action in this respect is well nigh, if not completely, controlling * * * and does not violate the Fourteenth Amendment of the Constitution of the United States or of the State of California."

Page 537 (3-4).

In the *Kaiser* case it was a matter of specific legislation already enacted and in the instant case there is yet to be specific enactment or legislation as to "cessation of hostilities."

Appellee is unable to appreciate that appellant's cited cases are in point.

Dated, San Francisco,
August 22, 1947.

Respectfully submitted,
J. J. DOYLE,
Attorney for Appellee.